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Marcus C. Migliore  
Air Line Pilots Association  
1625 Massachusetts Ave., NW  
Washington, DC 20036

Court Reporter: Bruce Slavin, RPR, CMR

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1 THE COURT: Is everybody here in the Carr case?  
2 We'll go ahead with you.

3 Come on up. Go ahead and state your  
4 appearances, please.

09:28 5 MR. MILASINCIC: Good morning, Your Honor. Adam  
6 Milasincic and Howard Dulmage for the Plaintiffs. And we  
7 also have with us today Andrew Elkouri, who is one of our  
8 summer associates from the University of Chicago.

9 THE COURT: Oh. Great. Good school. I went  
09:28 10 there, too.

11 MR. ABRAM: Good morning, Your Honor. Mike Abram  
12 along with Marcus Migliore and Al Southerland for ALPA.

13 THE COURT: So, we have a couple of pending  
14 motions. Let's address those to begin with. Let's take up  
09:29 15 the motion to dismiss first. Okay?

16 MR. ABRAM: Your Honor, would you like me to  
17 proceed?

18 THE COURT: That's fine.

19 MR. ABRAM: Okay. Great. So, thank you, Your  
09:29 20 Honor --

21 THE COURT: And let's assume, first, that I am not  
22 going to look at anything that would require me to convert  
23 to a summary judgment motion. I am testing merely the  
24 sufficiency of the pleadings.

09:29 25 MR. ABRAM: Thank you, Your Honor.

1 THE COURT: Let's start with that premise.

2 MR. ABRAM: Okay. Thank you.

3 So, the Plaintiffs have a responsibility here  
4 to plead facts which, if proven, would show that ALPA, in  
09:29 5 bad faith, interfered with, manipulated and, as they put it,  
6 skewed the arbitration between the Continental pilots and  
7 the United pilots, the pre-merger groups.

8 THE COURT: I don't think anybody disagrees about  
9 what the legal standard is under Rule 12(b)(6) or --

09:30 10 MR. ABRAM: Right.

11 THE COURT: -- as applied to the duty of fair  
12 representation.

13 MR. ABRAM: Right. And I think that's absolutely  
14 correct, Your Honor.

09:30 15 So, the question is what facts have they pled  
16 that would establish that, and, for that purpose, our motion  
17 is that they have not pleaded sufficient facts to make out  
18 that case.

19 They claim, first of all, that ALPA had a  
09:30 20 motive to do something to interfere. Okay. So, that would  
21 be a fact which, if proven, would be an important fact in  
22 this case, but -- So, let's just assume that to be the case  
23 for purposes of this motion.

24 The question is, though, what did ALPA  
09:30 25 actually do that they plead that ALPA actually did that

1 would seriously undermine the integrity of the arbitration  
2 as *Hines v. Anchor Motor Freight* requires.

3 And here we have a group of facts that they  
4 allege to be facts and that we have to assume to be true:  
09:30 5 First, that the arbitrators were paid more money than the  
6 normal going rate for their work in order to expedite the  
7 arbitration. There were three arbitrators. And, so, that  
8 is an alleged fact that does not show any interference with  
9 the integrity of the process. It doesn't suggest that the  
09:31 10 arbitrators were corrupted by ALPA and, in fact, the  
11 Plaintiffs concede that they're not claiming that the  
12 arbitrators were corrupted.

13 The reality is that the money for that process  
14 comes from the two MECs, not from the home office. Each of  
09:31 15 the pilot groups has to pay through their budget for that  
16 arbitration.

17 THE COURT: When you say "the reality is", is that  
18 a summary judgment reality or is that a pleading sufficiency  
19 reality.

09:31 20 MR. ABRAM: Pleading sufficiency reality because it  
21 is based upon the -- it's the Merger Policy, which is  
22 central to their complaint. So, we do rely on documents  
23 that they've referred to in their complaint and that are  
24 central to their complaint.

09:32 25 THE COURT: All right. Standard.

1 MR. ABRAM: So, that's part of it, and that's in  
2 our motion and Merger Policy which they address in their  
3 complaint.

4 The second and, of course -- the second thing  
09:32 5 they say is that an ALPA attorney was present for one  
6 discussion about documents to be produced in the arbitration  
7 payroll records, but that doesn't show any interference with  
8 the arbitration. It just shows that somebody was present  
9 for that. And they allege that a lawyer wasn't present for  
09:32 10 another occasion when there was another objection, but they  
11 don't in any way show how that interfered with the -- or  
12 hurt the Plaintiffs in any way in the arbitration.

13 They say that there was an alleged conflict on  
14 the part of a Continental pilot who was a Continental  
09:33 15 representative and that ALPA didn't investigate that alleged  
16 conflict. But the documents that are, in fact, central to  
17 the complaint -- the Merger Policy as well as the Protocol  
18 Agreement between the Continental and United pilot groups --  
19 show that the -- all of these -- the arbitrators were  
09:33 20 selected and the -- excuse me -- the representatives were  
21 elected by their own pilots, by their own Continental MEC  
22 pilots; and the Plaintiffs don't allege that their own  
23 representatives were corrupt, were acting against their own  
24 interests in the seniority integration. And, in fact, the  
09:33 25 documents that are referred to and that are central in the

1 complaint, including the award itself, as well as the briefs  
2 of the two committees, show clearly that the Continental MEC  
3 representatives, the Continental pilots, argued vigorously  
4 for the interests of the Continental pilots in that process.

09:34 5 They complain about the fact that ALPA changed  
6 its Merger Policy to include longevity as a factor in the  
7 arbitrations, in the seniority integration.

8 Okay. So, first of all, longevity is -- it's  
9 hard to argue that that's somehow a bad faith act to include  
09:34 10 length of service in a seniority integration, but it was  
11 done and, again, the documents show clearly -- the ones that  
12 are referred to in the complaint -- that it was done before  
13 the United-Continental arbitration, before the merger took  
14 place. Before the merger was even announced it was done.  
09:35 15 It was a general application throughout the Union.

16 Mr. Brucia, who was one of the Continental  
17 pilots on the -- and chairman of their committee  
18 representing the Continental pilots in the arbitration, was  
19 a member of the committee -- and he testified as such and  
09:35 20 that's also referred to -- in order to get the -- in order  
21 to make that change. The change to include longevity is  
22 simply a recognition of the importance of that factor in  
23 seniority integration.

24 Now, in the arbitration itself, as Plaintiffs  
09:35 25 point out, the United pilot group argued that including

1 longevity was a very important change. The Continental  
2 pilot group, again, as the briefs show, argued that it  
3 wasn't such an important change and they didn't want  
4 longevity to be considered, and their proposal, as the  
09:36 5 arbitration award says, was to not include longevity.

6 So, there was a big dispute between the two  
7 committees over the importance of longevity. And the United  
8 pilots quite appropriately argued, well, this was a very  
9 important change, look at what had happened before, and  
09:36 10 their arguments are all laid out in the arbitration award as  
11 well as the Continental pilots argument. It's all there.

12 And the Plaintiffs complain that ALPA didn't  
13 stop the United pilots from making that argument, but ALPA  
14 wasn't a party to the arbitration. The arbitration was  
09:36 15 between these two groups. The Continental pilots, through  
16 their own counsel and their own committee, testified and  
17 made arguments on that very subject. They handled it for  
18 themselves. They took care of it themselves. That was  
19 their job and they did it.

09:36 20 The Plaintiffs complain that the arbitrators  
21 were selected by a list -- from a list preapproved by ALPA.  
22 Well, that was their decision, the Continental pilots and  
23 the United pilots. That's in the record. That's in the  
24 protocol. It's right there. That is central to the  
09:37 25 complaint, that they -- that was how this was done. They



1 had the right, under the Merger Policy, to do it any way  
2 they wanted and they chose to do it that way.

3 In the end, what they're really trying to say  
4 is that they are not in any way to be bound by anything that  
09:37 5 their own representatives did, that if their  
6 representatives, the Continental pilot representatives, who  
7 were elected by the Continental MEC, who are, in turn,  
8 elected by the Continental pilots -- if those pilots didn't  
9 complain about what happened, if they didn't object to the  
09:38 10 arguments the United pilots made, if they approved the  
11 selection of the arbitrators, if they agreed to the payment  
12 of these fees, whatever it is, whatever they did, and that  
13 they didn't follow any of the procedures that were available  
14 to them to object to any of this within the arbitration or  
09:38 15 to object to United Airlines -- which they had a right to do  
16 as a union group -- If they didn't do any of these things,  
17 then it didn't matter to the Plaintiffs; the Plaintiffs are  
18 strangers to this; they had nothing to do with this. But  
19 that's not the law.

09:38 20 There are two laws that say exactly the  
21 contrary. One law is the Railway Labor Act, which governs  
22 these labor relations, which say, 'Folks, you have got a  
23 union. You're bound by what your union does for you unless  
24 you show' --

09:38 25 THE COURT: It's not so much being bound by what

1 the arbitrators did. It's being bound by the position the  
2 union representatives took in the arbitration.

3 MR. ABRAM: That's correct, Your Honor.

4 THE COURT: It's a kind of estoppel.

09:38 5 MR. ABRAM: Exactly. It's always saying, you know,  
6 that, since the union representatives didn't complain,  
7 you're in privity with them and you're bound by their  
8 failure to complain.

9 In this case, if it were true and if the  
09:39 10 Plaintiffs had alleged with facts that would sustain the  
11 case that their representatives, the Continental  
12 representatives, were in bad faith, that they were acting  
13 against their own interests because --

14 THE COURT: They breached their own duties.

09:39 15 MR. ABRAM: Right. If they had alleged that, okay,  
16 we'd have a case to deal with here. But that's not what  
17 they're alleging.

18 They insinuate here and there that, well,  
19 these are ALPA insiders, they have been around a long time.  
09:39 20 But they don't say, nor could they say in good faith, that  
21 those pilots who were elected by their own MEC -- that those  
22 pilots had -- were in any way corrupted in order to  
23 subordinate the interests of the Continental pilots in the  
24 seniority integration, which was going to affect them for a  
09:40 25 long time to come, as well as to affect themselves -- that

1 they were in some way suborned or corrupted by ALPA's desire  
2 not to lose members. They don't say that nor could they say  
3 that.

4 So, given all that --

09:40 5 THE COURT: Of course, the allegations are, if you  
6 will, two concerns. And I am happy to have you address  
7 these and then I will hear from counsel for the Plaintiffs.

8 One is that the allegations, of course, don't  
9 focus on what the Continental pilot representatives did.

09:40 10 The allegations, instead, focus on what the ALPA  
11 representatives or the ALPA entity did and didn't do,  
12 ranging from compiling a list of potential arbitrators,  
13 helping United before the arbitration, not by sending the  
14 in-house lawyer to assist in discovery, not offering that to  
09:41 15 Continental, allowing the arbitrators to intercept words in  
16 a merger policy that the Plaintiffs say is against the  
17 Merger Policy, allowing the United pilots to use the threat  
18 of decertifying ALPA post-merger as an argument for the  
19 seniority list to favor United pilots -- I mean, keep going  
09:41 20 down the line and admitting that ALPA remained silent -- and  
21 I'm not sure how that cuts -- but arguing, at least, that  
22 ALPA was in some fashion not neutral in this respect, that  
23 ALPA hires a consultant, the nineteen-thousand-dollar issue.

24 As I understand it, your key evidence about  
09:41 25 that comes from Mr. Hamilton's declaration. There, I'm not

1 sure I can properly consider that under 12(b)(6) --

2 MR. ABRAM: I understand that, Your Honor. We'll  
3 deal with that in a minute, if we could.

4 THE COURT: Payment of the arbitrators at more than  
09:42 5 the going rate. I am a little unclear how that's a breach  
6 of duty at all, since there is no allegation that the  
7 arbitrators themselves were corrupt.

8 So, those allegations don't have anything to  
9 do with what Continental did or didn't do in terms of its  
09:42 10 pilot representatives' positions during the arbitration.

11 MR. ABRAM: Well, if I may. Some of those, that's  
12 correct, but some of them no, because to the extent that  
13 they're complaining about acts that took place during the  
14 hearing the --

09:42 15 THE COURT: The failure to object.

16 MR. ABRAM: The failure to object. But putting  
17 that aside, putting aside the failure to object, none of the  
18 acts that they allege that the entity, as Your Honor put it,  
19 did are sufficient to show that -- if proven, would show --

09:42 20 would enable a factfinder to determine that ALPA had

21 seriously undermined the integrity of that arbitration.

22 That is what we are arguing on that, that --

23 THE COURT: My next question bears on just that  
24 point, which is that, as I compare the nature of specificity  
09:43 25 of the allegations in other cases that have either granted

09:43

1 motions to dismiss, breach of duty, fair representation  
2 claims, or denied them -- the allegations in this case look  
3 pretty good compared to those that have bombed early. That  
4 is, they are not entirely conclusionary by any means; they  
5 are specific.

09:44

6           You may disagree on whether, if proven, the  
7 allegations of specific breaches on the part of ALPA would  
8 be sufficient to show a breach, but if the issue is  
9 specificity, detail, inferences that could be raised by  
10 virtue of the detail, these allegations look more like those  
11 that have passed muster than those that have been sent  
12 packing early.

09:44

13           MR. ABRAM: Your Honor, if I may just address that,  
14 because I think that's the crux on that part of it,  
15 obviously.

16           THE COURT: Right.

09:44

17           MR. ABRAM: And that is that I do disagree and ALPA  
18 does disagree that these allegations would be sufficient to  
19 bring about a ruling, a verdict, that ALPA had violated its  
20 duty of representation or a judgment by this -- that none of  
21 them show the kind of dishonest conduct, fraud, deceitful  
22 action, which substantial evidence is required under  
23 *Lockridge* to show that ALPA seriously undermined the  
24 integrity of this arbitration, that these arbitrators, these  
25 three arbitrators who wrote an extensive opinion, were

09:45

1 influenced to come out the way they did because of those  
2 things that the courts --

3 THE COURT: Of course, it can be arbitrary rather  
4 than -- I mean, it's arbitrary or in bad faith.

09:45 5 MR. ABRAM: Either way, although they do focus on  
6 it being bad faith. But, either way, arbitrary is, you  
7 know, wholly unreasonable. And, either way, you still have  
8 to show, under *Hines*, that it seriously undermined the  
9 integrity --

09:45 10 THE COURT: I agree.

11 MR. ABRAM: -- and that's what's lacking. You  
12 can't leap to that because these three arbitrators -- There  
13 is not a single thing here that would lead any fair-minded  
14 person to believe that these three arbitrators came out the  
09:45 15 way they did because of any of these things. Even if ALPA  
16 itself, the entity, had acted in bad faith, the  
17 arbitrators -- you know, that they were somehow affected by  
18 that? There is not the slightest reason to think that, and  
19 that's what we're going to wind up with.

09:46 20 Putting aside the question of failure to  
21 complain and exhaustion, which I think is a separate ground  
22 that stands alone, the one fact question that is -- we say  
23 is a summary-judgment-type question is this question of the  
24 fees.

09:46 25 The policy does state that expenses -- and

1 this is the Merger Policy -- expenses of mergers are to be  
2 borne by the respective MECs, not by ALPA, and this would  
3 obviously be an expense like that, that ALPA itself, the  
4 treasury home office, would not be able to pay. That's the  
09:46 5 policy.

6 So, I think that's sufficient in itself. But  
7 if there was some doubt about whether the Union followed its  
8 policy, we did put in that declaration, and if that's the  
9 only thing that they think is -- If the Court winds up at  
09:47 10 the point and says, 'Well, I am worried about that. I don't  
11 want to make a decision without that being resolved,' we'd  
12 be very happy to make that available for discovery. We can  
13 make whatever is needed for that to be available for  
14 discovery. We've put in the declaration, we've put in the  
09:47 15 records, and we can put in the deponent, the declarant, and  
16 make them available or somebody else like him. That's not a  
17 problem.

18 I still think, no matter what, you still have  
19 the fact that all of this happened under the watchful eye,  
09:47 20 whatever happened -- which we say is nothing -- but, if  
21 something happened, it happened under the watchful eye of  
22 the Continental pilots' own representatives, who did not say  
23 a word that would say to ALPA, you know, 'Folks, you know,  
24 you're messing up here. This is not being fair. This  
09:47 25 happened, this happened and this happened and you have got

1 to do something about it.'

2 The Union, under McCaskill-Bond as well under  
3 the decisions like *Rakestraw* in the Seventh Circuit that say  
4 that this procedure satisfies the union's duty -- the union  
09:48 5 is entitled to rely on the representatives of both groups to  
6 do their jobs.

7 THE COURT: Well, I guess my question is -- You  
8 talk about whether the arbitrators acted arbitrarily or in  
9 bad faith. That's not the focus. It's whether the union  
09:48 10 acted arbitrarily or in bad faith. Right?

11 MR. ABRAM: I don't talk about that. I talk about  
12 whether --

13 THE COURT: Okay. Maybe I misunderstood.

14 MR. ABRAM: *Hines* says that the integrity of the --

09:48 15 THE COURT: I agree with that.

16 MR. ABRAM: -- must have seriously been undermined.

17 THE COURT: Right.

18 MR. ABRAM: So, for them to have been seriously  
19 undermined --

20 THE COURT: Fairness or integrity of the arbitral  
21 process --

22 MR. ABRAM: That's right.

23 THE COURT: -- must have been --

24 MR. ABRAM: That's right.

25 THE COURT: -- seriously undermined.



1 MR. ABRAM: Right. And I don't see how any of that  
2 would do it. And especially if it were -- again, the  
3 Continental pilots were present taking care of themselves  
4 and the union was entitled to rely upon that fact as part of  
09:48 5 the process, under both the Railway Labor Act and under  
6 McCaskill-Bond, which, although the Plaintiffs don't want to  
7 spend much time thinking about McCaskill-Bond, it is an  
8 expression of congressional intent that the union and the  
9 company implement their internal policies and, under that  
09:49 10 procedure, the union sets this up, makes it available.

11 The pilots pursue it and the union is entitled  
12 to rely upon their own integrity and self-worth, protecting  
13 the interests of their own pilots, which, clearly -- if you  
14 read the decision, Your Honor, they clearly fought hard for  
09:49 15 the interests of the Continental pilots.

16 THE COURT: So, is it your position that merely  
17 reading the arbitration award, not going back and looking at  
18 the underlying transcripts and hearings and all of that  
19 documentation, is sufficient to rule as a matter of law that  
09:49 20 the integrity and fairness of the process was intact?

21 MR. ABRAM: It is in this case because of the  
22 failure to make allegations of fact that would tend to show  
23 otherwise.

24 But, in addition, of course, Your Honor, the  
09:50 25 Plaintiffs rely upon the arguments that were made, and we

1 have submitted the excerpts from the briefs that they  
2 referred to. We've referred to the testimony. We have  
3 submitted that excerpt. And the Court can clearly see for  
4 herself that these were simply hard-fought issues between  
09:50 5 the Continental and United pilots.

6 THE COURT: Okay. All right. Let me hear from  
7 Plaintiff.

8 MR. ABRAM: If I may, just one last thing, Your  
9 Honor, before we all forget, and that is that, in the end,  
09:50 10 if the Court does decide not to dismiss the case -- and I am  
11 certainly hoping otherwise -- but if that were to happen, as  
12 we have pointed out, we really shouldn't be going forward  
13 here until United has been joined. Under McCaskill-Bond  
14 they're obligated to accept the result of the Merger Policy  
09:50 15 and they have done so. They have included the award in the  
16 collective bargaining agreement that --

17 THE COURT: They haven't sought to intervene.

18 MR. ABRAM: Say again, Your Honor.

19 THE COURT: They have not sought to intervene.

09:51 20 MR. ABRAM: They have not. We have notified them  
21 about the case. They kind of think that ALPA will protect  
22 their interests, but I don't believe that's the case. The  
23 Court can't change the agreement without their being  
24 present.

09:51 25 THE COURT: Well, I wouldn't change the agreement.

1 I would leave something in place that might require them to  
2 change it, but why wouldn't -- Look. I will phrase it this  
3 way.

4 What's the significance of the fact that this  
09:51 5 sophisticated entity that has hot-and-cold-running lawyers  
6 themselves has apparently not seen the necessity of filing a  
7 motion for leave to intervene?

8 MR. ABRAM: I will just give you my personal  
9 impression of dealing with United Airlines.

09:51 10 THE COURT: What's the legal significance?

11 MR. ABRAM: I appreciate that. The legal  
12 significance is -- I believe there is none, because I  
13 believe and based on what they've told me that they think  
14 the case will not get to the point where there would be a  
09:52 15 judgement that would affect their agreement.

16 THE COURT: And who am I to interfere with their  
17 business and legal judgments about what they need to worry  
18 about?

19 MR. ABRAM: Because, if ALPA was subject to an  
09:52 20 order, Your Honor, that it had to go through this process  
21 and come up with a new award, we have no ability to compel  
22 United to accept that. They have accepted and included in  
23 their agreement a whole -- and lots of things have depended  
24 upon that having taken place.

09:52 25 When you change the seniority you're going to

1 be changing a great deal -- or whoever would change it or  
2 change it for these plaintiffs -- would change a great deal  
3 in that agreement; and, so, we can't do that unilaterally.

4 THE COURT: What's your best case for requiring an  
09:52 5 employer to be joined in a breach of fair duty, a  
6 representation case between a union and a union member?

7 MR. ABRAM: I am not going to be able to cite you  
8 the best case in that respect, Your Honor, but I would say  
9 that in most of the cases the plaintiffs are seeking damages  
09:53 10 from the union. In this case they are not. They're seeking  
11 equitable relief in the form of an order on their own behalf  
12 and, ultimately, they would like, on behalf of the class, to  
13 change the arbitration -- have a new arbitration and a new  
14 award which would then -- ALPA would then have to try to  
09:53 15 incorporate in the agreement with United, which ALPA does  
16 not have the power to do.

17 And it's simply the fact that the Union is  
18 just one party to an agreement that the Plaintiffs are  
19 proposing to change. It's just standard, in my view,  
09:53 20 joinder law, that they should be joined.

21 THE COURT: There is a difference between "could  
22 be" and "should be".

23 MR. ABRAM: Correct, Your Honor. I said "should"  
24 and maybe it's "could", but I think "should". Thank you.

09:53 25 MR. MILASINCIC: Thank you, Your Honor.

1 I will take up first the issue of this  
2 internal exhaustion argument that's been made, which I think  
3 can be dispensed with fairly quickly or could even be  
4 dispensed with, as Your Honor has pointed out, by declining  
09:54 5 to look, at this stage, at anything beyond what's in the  
6 pleadings, because all of these internal exhaustion  
7 arguments do rely entirely on exhibits that are wholly  
8 outside the pleadings and that do not relate to our  
9 allegations.

09:54 10 Their essential argument here is that all of  
11 the 4,600 Continental Airlines pilots --

12 THE COURT: What about the failure to -- Well, is  
13 there any evidence that I can -- proper evidence,  
14 information -- disclosed in the pleadings and the documents  
09:54 15 that are appropriately considered under 12(b)(6)? Is there  
16 information available in that universe that would enable me  
17 to assess sufficiently the impact of the positions taken by  
18 the Continental representatives elected by the Continental  
19 pilots?

09:55 20 MR. MILASINCIC: Actually, Your Honor, there are  
21 two items that we refer to in the complaint, one of which is  
22 the Merger Policy itself that can be considered. And the  
23 significance of what's in there, as we point out in our  
24 brief, is that these documents we have referred to in the  
09:55 25 complaint point out that neither the merger committee

1 members themselves nor even the arbitrators themselves, let  
2 alone the rank and file pilots, have any authority, after  
3 the award has been announced, to go back and challenge it or  
4 appeal it in any way within the union.

09:55 5 Even as to the arbitrators they are prohibited  
6 by ALPA Merger Policy from changing the award, reversing the  
7 award. All they can do is interpret the award with the  
8 understanding that it was valid and will continue to be  
9 valid unless the Court --

09:55 10 THE COURT: What about the position taken  
11 pre-award? What information is available -- Let's set aside  
12 for the moment the absence of post-award challenges, which I  
13 think your point is there wasn't any avenue to do that,  
14 although you're here. What about the argument that,  
09:56 15 pre-award, there was apparent acquiescence? What sources of  
16 information do I have properly considered under 12(b)(6) as  
17 to that?

18 MR. MILASINCIC: The only one would be the Merger  
19 Policy, which specifies that these rank and file pilots have  
09:56 20 no role in selecting these merger committee representatives  
21 who, supposedly, were in privity with all 4,600 pilots.

22 THE COURT: What you're saying is, even assuming  
23 everything he says is right, these representatives were not  
24 in a relationship to Continental that would give rise to  
09:57 25 this estoppel effect? Is that what --

1 MR. MILASINCIC: These representatives were not in  
2 a relationship to the individual Continental pilots that  
3 would give rise to any estoppel effect.

4 THE COURT: Who picked them?

09:57 5 MR. MILASINCIC: The merger committee  
6 representatives appoint --

7 THE COURT: Who picked the Continental people on  
8 the merger committee?

9 MR. MILASINCIC: There is an election for the  
09:57 10 executive committee, and the executive committee then  
11 appoints this subset of individuals.

12 THE COURT: And who elects the executive committee?

13 MR. MILASINCIC: It's a group-wide vote by the  
14 pilots for a given airline.

09:57 15 THE COURT: And is there a United election and a  
16 Continental election that's separate?

17 MR. MILASINCIC: There was prior to the seniority  
18 arbitration. But an important thing is that, since that has  
19 occurred and as we have alleged in the complaint, that those  
09:57 20 two entities have been collapsed --

21 THE COURT: I asked about that before, because  
22 we're talking about who picked the Continental  
23 representatives. And what you're telling me is that it  
24 ultimately did get picked by the Continental pilot  
09:58 25 membership because they elected the executive committee who

1 picked the Continental slots.

2 MR. MILASINCIC: Well, it's a very indirect --

3 THE COURT: It doesn't sound indirect to me.

4 MR. MILASINCIC: Well, they're not electing the

09:58 5 folks who take the positions that bind them, allegedly, in  
6 the arbitration. And the reality is that, even if these  
7 were direct elections --

8 THE COURT: Wait. Let me back up.

9 So, Continental has an election. Continental  
09:58 10 pilots have an election that elects the executive committee  
11 pre-merger --

12 MR. MILASINCIC: That's correct.

13 THE COURT: -- or pre-arbitration and that  
14 executive committee of only Continental pilots elected by  
09:58 15 Continental pilots picks the Continental representatives?

16 MR. MILASINCIC: That's correct.

17 THE COURT: That doesn't sound indirect to me.  
18 That sounds like Continental, Continental, Continental.

19 MR. MILASINCIC: Sure.

09:58 20 THE COURT: So, why isn't that the type of  
21 relationship that would, properly considered as you have  
22 told me under 12(b)(6) -- because it's all laid out in the  
23 Merger Policy or other documents properly considered under  
24 12(b)(6) -- why isn't that enough to establish the kind of  
09:59 25 unity of interest that might support an estoppel theory?



1 MR. MILASINCIC: Well, Your Honor, it's really the  
2 estoppel theory itself that is the problem. Because even if  
3 these individuals were directly elected by the Continental  
4 pilots we would still have the same problem.

09:59 5 THE COURT: Which is?

6 MR. MILASINCIC: That what these merger committee  
7 representatives supposedly should have done would be object  
8 to evidence or write letters complaining about things in  
9 real-time as they came up.

09:59 10 THE COURT: Or argue vigorous -- Are they present  
11 at the arbitration?

12 MR. MILASINCIC: The merger committee  
13 representatives are. That's right.

14 THE COURT: So, what about objecting there? How  
09:59 15 about making arguments that this is unfair, that this is  
16 designed only to further ALPA's interests post-merger rather  
17 than designed to be a neutral and fair treatment of the  
18 merged pilots?

19 MR. MILASINCIC: Yes. That's exactly correct.  
10:00 20 They could have done all those things at the time if somehow  
21 before the award was announced they were able to recognize  
22 then, in real-time, what was happening, what the  
23 significance of all these isolated incidents together would  
24 be. I mean, until the award was announced, there was no way  
10:00 25 that they could have recognized what the effect of these

1 actions were going to be, and there could be strategic  
2 reasons to pull punches along the way.

3 THE COURT: What is your best case for saying that  
4 there is no pre-award estoppel effect? I understand your  
10:00 5 argument there is no post-award sort of estoppel, slash,  
6 failure to exhaust argument because of the limits on the  
7 ability to do anything post-award. I'm not saying I agree  
8 with it, but I understand the argument.

9 What is your legal authority for saying, yes,  
10:01 10 they were there as the duly elected Continental  
11 representatives selected by Continental, but the fact that  
12 they sat on their hands is not something to be -- it doesn't  
13 block claims because they didn't have sufficient information  
14 that would enable them to appreciate the significance of the  
10:01 15 ALPA-skewing that was going on?

16 MR. MILASINCIC: Your Honor, our reliance there is  
17 more on the absence of any authority supporting this  
18 estoppel argument that the Plaintiffs are raising, because  
19 all they have cited to the Court are very typical  
10:01 20 res judicata type cases that we have no disagreement.

21 THE COURT: Yeah. But this is different from  
22 typical res judicata.

23 MR. MILASINCIC: Right.

24 THE COURT: This is not res judicata by virtue of  
10:01 25 the award. This is, essentially, a form of judicial

1 estoppel transported into the arbitration context. Right?

2 UNIDENTIFIED SPEAKER: Yes, Your Honor. That's  
3 correct.

4 THE COURT: And judicial estoppel is a very narrow  
10:02 5 doctrine, as I understand it.

6 MR. ABRAM: Yes, Your Honor. It's very narrow,  
7 Your Honor. And we have cited cases, such as *Acree* and  
8 *Gvozdenovic* -- I have a partner who can pronounce that, but  
9 I can't -- that show the union members are, we say, bound in  
10:02 10 the sense that, if their representatives didn't do something  
11 or if they did something, that they are bound by it, and we  
12 rely on the Railway Labor Act as well as on McCaskill-Bond  
13 in this instance.

14 But that's -- in respect to all this time  
10:02 15 before the award, to say, when you're sitting there, that  
16 you have a strategic reason for not objecting, if you see  
17 the United pilot representatives making an argument about  
18 why the Merger Policy changed and you don't like the way  
19 that argument is going because it suggests to you that  
10:03 20 somehow the United pilots are giving warning to the  
21 arbitrators that they're going to wreck the union if they  
22 don't rule in favor of the United pilots -- If that's what  
23 you're thinking and if that's what they get from reading the  
24 transcript, surely counsel and this committee of people,  
10:03 25 including one guy that was on the committee that made the

1 change, would be able to say something, would know  
2 something.

3 THE COURT: But the way you just made the argument  
4 leads me to my next question, which is back to you, but I  
10:03 5 want to hear from the Plaintiffs' lawyers as well.

6 It sounds to me that the sources that I would  
7 have to look to to determine whether this argument could  
8 preclude the Plaintiffs' challenge would be outside the  
9 category of information I could consider on a 12(b)(6)  
10:04 10 motion. I'd have to go into the transcripts. I'd have to  
11 explore -- I'd have to consider information about the  
12 apparent significance of discrete positions that were not  
13 objected to -- and the key word there is "apparent" -- at  
14 the time, none of which would appear to me is really part  
10:04 15 and parcel or sufficiently contained in the documents that I  
16 could consider under 12(b)(6).

17 MR. ABRAM: If I may respond to that.

18 THE COURT: Am I right on that?

19 MR. ABRAM: I think not, Your Honor.

10:04 20 THE COURT: Tell me why.

21 MR. ABRAM: All right. We're referring to a very  
22 discrete part of this case that the Plaintiffs refer to in  
23 the complaint, which is the arguments made by the United  
24 pilots in their brief and, for that purpose, the brief is  
10:05 25 ripe, is available to you. We have shown you the brief.

1 And the testimony of the United pilots in this part of the  
2 arbitration in which Captain Smith testified for the United  
3 pilots and Captain Brucia testified for the Continental  
4 pilots -- and those are -- we have referred to those because  
10:05 5 we regard them at the core of what they're alleging as to  
6 what happened in the arbitration, that they said this  
7 happened in the arbitration. And we show the transcripts  
8 showing what happened and Your Honor can see that --

9 THE COURT: I'm not sure that every document that  
10:05 10 is related to the arbitration can be considered under  
11 12(b)(6) based on this expansive notion that you have  
12 advanced.

13 MR. ABRAM: There are different formulations in the  
14 courts. Some courts say it has to be at the core. Some  
10:05 15 courts say it has to be referred to. But I will go with the  
16 narrower one, that the core --

17 THE COURT: Usually it means contracts or patents  
18 or something like that. It doesn't tend to mean the entire  
19 transcript of an underlying proceeding.

10:06 20 MR. ABRAM: Nor are we offering the entire  
21 transcript, Your Honor. We're only referring Your Honor to  
22 that part of the transcript that lies at the core of the  
23 complaint of the argument made by the United pilots, which  
24 is regarding the significance of the change in the Merger  
10:06 25 Policy and the argument -- and the testimony of the United

1 pilots regarding the significance of the change in the  
2 Merger Policy, all of which, again, preceded this event.

3 So, that, we regard, as being at the core.

4 I mean, I think that, in this district, that  
10:06 5 these are documents that are referred to and central to the  
6 complaint.

7 I have been pointed out what we have said in  
8 our -- in Document 23.

9 THE COURT: I know of the standard.

10:07 10 MR. ABRAM: Your Honor is familiar with the  
11 standard.

12 We regard these as at the core of what they're  
13 saying. They're saying this is what happened in the  
14 arbitration and the transcript, and the brief excerpts show  
10:07 15 exactly what happened in the arbitration and show, on this  
16 narrow point, that the Plaintiffs' representatives, the  
17 Continental merger representatives, made their argument, but  
18 they didn't say that this was somehow an improper argument  
19 on the part of the United pilots nor -- They didn't say  
10:07 20 that. They didn't raise that issue. Whether it was for  
21 strategic, tactical or whatever reasons, they chose not to.  
22 They chose to respond on the merits and that's right there.

23 So, I don't think we're going anywhere beyond  
24 what's at the core of the complaint when we go into that,  
10:08 25 Your Honor.

1 THE COURT: All right. Let me hear the Plaintiffs'  
2 view of, first, the propriety of looking at this information  
3 and, second, what additional information might be needed to  
4 consider it fairly important.

10:08 5 MR. MILASINCIC: Well, first, it would not be  
6 proper to consider all of this extensive -- these extensive  
7 exhibits that have been offered. As the argument has just  
8 shown, the purported significance of those exhibits requires  
9 quite a number of inferences to be drawn in favor of the  
10:08 10 Defendants. It requires quite an elaborate explanation  
11 before even identifying what those inferences are. And to  
12 have to -- And you would, to understand the entire  
13 significance of it and why objections were asserted or not  
14 asserted at particular points. Reading a single page or a  
10:09 15 couple of pages from a transcript would not provide the  
16 Court with the full picture of what was happening there.

17 Other sources of information that would have  
18 to be looked at, ultimately, would include the depositions  
19 of these Continental merger committee representatives,  
10:09 20 perhaps of their attorneys, if it's possible to do that  
21 without stepping on privilege issues. Those are the sources  
22 that you would have to go to before you could understand why  
23 these representatives did or didn't do the actions that they  
24 supposedly should have taken.

10:09 25 And I would also point out to the Court that

1 all of the argument that we have just heard relates entirely  
2 to one of the allegations in the complaint, that allegation  
3 being that the United merger representatives talked in the  
4 arbitration about the political implications to ALPA and  
10:09 5 nobody objected to that.

6 Even assuming that all that's true, that  
7 leaves aside every other allegation in the complaint -- the  
8 payments to the witnesses, to the arbitrators -- and there  
9 is no --

10:10 10 THE COURT: No. No. I'm not talking about those  
11 right now. I am talking about this estoppel theory.

12 MR. MILASINCIC: Right.

13 THE COURT: So, your basic argument is that I  
14 really can't consider any of the transcript under the  
10:10 15 12(b)(6) category?

16 MR. MILASINCIC: That's correct. And you had asked  
17 earlier, Your Honor, for our best case as to why this  
18 argument fails, and I would cite the Court to *Addington v.*  
19 *The U.S. Airline Pilots Association*, which is in our brief  
10:10 20 at 588 F.Supp 2d 1051. And that was a case where ALPA made  
21 virtually the identical same argument that they're making  
22 here, and the Court had some very well reasoned explanations  
23 for why --

24 MR. ABRAM: I don't think ALPA was a party to that.  
10:10 25 Addington was against the USAPA.



1 MR. MILASINCIC: USAPA was the named defendant in  
2 that case, but USAPA was a spin-off of ALPA; and, so, ALPA  
3 did participate in that litigation and takes the position --  
4 And regardless of whether it was ALPA doing it or USAPA  
10:11 5 doing it, the argument is --

6 THE COURT: The estoppel --

7 MR. MILASINCIC: -- it's the same estoppel theory,  
8 the same idea that there should have been real-time  
9 objections.

10:11 10 THE COURT: Motion to dismiss or summary judgment?

11 MR. MILASINCIC: Summary judgment.

12 THE COURT: Does it address in any way whether it  
13 could have been considered under a motion to dismiss? The  
14 case.

10:11 15 MR. MILASINCIC: Oh. I'm sorry. I thought you  
16 were asking for our opinion of --

17 THE COURT: Both.

18 MR. MILASINCIC: Well, our opinion is that this  
19 issue should be decided in a summary judgment context. I  
10:11 20 honestly do not remember, without going back to look, the  
21 context of *Addington*. I believe it was dismissal, but I  
22 would have to double-check.

23 MR. ABRAM: I believe it was summary judgment, Your  
24 Honor. But in this case paragraph 50 of --

10:11 25 THE COURT: In which case is "this case"?

1 MR. ABRAM: In our present case, paragraphs 51  
2 through 53 of the complaint specifically refer to the  
3 arguments made in the opening briefs of United pilots and to  
4 the testimony being made in the arbitration.

10:12 5 So, to say that you can't refer to the  
6 complaint -- can't refer to the documents that are right  
7 here at the core of this issue in 51 through -- I don't see  
8 that.

9 MR. MILASINCIC: Well, and that goes to what the  
10:12 10 core is. Again, we're talking about two paragraphs out of a  
11 hundred and some paragraphs. And even if you accept their  
12 argument that those arguments were precluded --

13 THE COURT: It's a defensive argument.

14 MR. MILASINCIC: Right.

10:12 15 MR. ABRAM: Of course.

16 THE COURT: Basically, it's a defense argument.

17 So, the core of the complaint is a little --

18 MR. MILASINCIC: And even if the merger  
19 representatives could have objected to those particular  
10:12 20 arguments about the political ramifications, we have many  
21 others allegations that they don't even attempt to explain  
22 what the merger reps --

23 THE COURT: Okay. So, let's shift a little bit  
24 into the next area, not on estoppel but on the argument that  
10:13 25 there was not any -- that the pleading is not sufficient to

1 show that the positions taken by the Union were arbitrary or  
2 in bad faith or that they undermined in a substantial or  
3 significant way the integrity or fairness of the arbitral  
4 process.

10:13 5 MR. MILASINCIC: Yes, Your Honor. I will take  
6 those in order.

7 First, as to what ALPA did. As the Defendants  
8 have already pointed out, the primary allegations that we  
9 have are, first, that ALPA sent one of its own lawyers not  
10:13 10 just to attend but to participate in a discovery hearing and  
11 the caucuses among the parties when United pilots were  
12 objecting to the production of some critical documents for  
13 the case. That, in and of itself, taking all inferences in  
14 favor of the Plaintiff, would have been improper. It became  
10:14 15 even more improper when they did not offer the same  
16 assistance to Continental pilots when those pilots objected  
17 to producing similar information.

18 ALPA paid a witness to testify on behalf of  
19 the United States pilots. As we have alleged in the  
10:14 20 complaint, that witness himself expressed to ALPA his  
21 concerns about the impropriety of doing that. ALPA not only  
22 said go ahead and do it, but ALPA paid him to do it.

23 Now, we understand that they have this  
24 summary-judgment-type argument that if you take some  
10:14 25 reports, not the ones that we have cited, add them to

1 others, add them to the testimony of the gentleman whose  
2 affidavit that they have submitted, that they have an  
3 explanation for how those payments were made and why that  
4 was proper. That's fine and that's an argument that can be  
10:14 5 taken up at summary judgment or in front of the jury, but  
6 for motion to dismiss purposes we have alleged and have  
7 reason to believe that the allegations as stated are true.

8 Additionally, there were the payments to the  
9 arbitrators double the going rate and for the express  
10:15 10 purpose of reaching an unusually fast resolution to this  
11 arbitration. And --

12 THE COURT: Usually, that's a good thing.

13 MR. MILASINCIC: In some cases it is, but the  
14 Merger Policy neither provides for this extra expedited  
10:15 15 procedure or the payment --

16 THE COURT: Everybody had to make a decision here.  
17 I mean, this was critical. That argument -- that's like  
18 faulting a judge for being too fast in resolving an issue  
19 that's critical to the ongoing business of the litigants.  
10:15 20 That I just don't -- I mean, that strikes me as: It was  
21 undermine because it was thorough but fast.

22 MR. MILASINCIC: Your Honor, the point is the  
23 payments, the doubling of the money. And we're not alleging  
24 corruption, nor do we have to. They're very different  
10:15 25 standards.

1 THE COURT: But that's what bothers me. They were  
2 paid to work really hard to get this done fast because both  
3 sides needed to know. They were running an airline. They  
4 had the flights in the sky.

10:16 5 MR. MILASINCIC: Right. I mean, the Merger Policy  
6 does not provide for that.

7 THE COURT: So what?

8 MR. MILASINCIC: It was never done at any prior --

9 THE COURT: Business need. That just seems to me  
10:16 10 to be a weird argument. Help me understand what I am  
11 missing here.

12 MR. DULMAGE: Your Honor, if I could jump in on  
13 the -- since you bring up the "business need" point.

14 Continental and United were running their  
10:16 15 flight operations separate and apart. In fact, I'm not even  
16 sure as we stand here today --

17 THE COURT: Yeah. But everybody knew that the idea  
18 was to get the merger merged.

19 MR. DULMAGE: But they were so far behind on  
10:16 20 operationally merging things --

21 THE COURT: I understand.

22 MR. DULMAGE: -- but the time frame that we're  
23 talking about was much quicker than needed to be under the  
24 circumstances.

10:16 25 THE COURT: Needed to be. You had arbitrators who

1 were paid, who worked efficiently, faster than most  
2 arbitrators do. That may say more about most arbitrators  
3 than it does about the speed of this process.

4 But, even if it was fast, it's thorough. It's  
10:17 5 reasoned. How am I to conclude from the arbitration award  
6 itself that -- even considering the speed and the fact that  
7 there was a larger than customary or usual payment, when  
8 there is no allegation that the arbitrators were bought,  
9 bribed, corrupted or in any way had their own integrity  
10:17 10 compromised?

11 MR. MILASINCIC: Your Honor, on the last point, we  
12 don't allege that there are -- that these arbitrators lack  
13 integrity, but we do have some very specific allegations of  
14 how the arbitrators' decision was affected by the Union's  
10:17 15 breaches of its duty.

16 THE COURT: I understand that, but that's different  
17 from -- The point that you're making now, I have a real hard  
18 time understanding the relationship between the -- I  
19 understand your argument that ALPA could take positions that  
10:18 20 the arbitrators would find persuasive and that those  
21 positions themselves were so flawed, so not neutral, so  
22 partial, that they affected the arbitral process. That's  
23 what I understand to be your key argument, if you will.  
24 Am I wrong on that?

10:18 25 MR. MILASINCIC: That's part of it, Your Honor.

1 And I think we're moving here beyond these payments, which  
2 I'm happy to do.

3 Another fact that hasn't even been addressed  
4 yet today is that in cases like this one where bad faith is  
10:18 5 at issue, subjective intent --

6 THE COURT: Of the union.

7 MR. MILASINCIC: -- of the union or in the  
8 analogous context of a fraud case where somebody's  
9 intentional wrong-doing, attempt to mislead, bad faith, is  
10:18 10 at issue, the Fifth Circuit has recognized that -- and we're  
11 not saying this is, by itself, sufficient -- but one  
12 additional factor to look at is, in light of the actual  
13 intervention and non-intervention that we have alleged, you  
14 can also consider the fact that ALPA had the motive --  
10:19 15 that's not even been contested -- and that they had the  
16 opportunity to do much, much more than what --

17 THE COURT: I think that's why the focus, as I  
18 understand the Defendants' argument, is on what was the  
19 effect on the arbitral process.

10:19 20 MR. ABRAM: Right. Even allowing all the  
21 inferences that Plaintiffs want, that somehow ALPA intended  
22 any of these things to have an influence. How would they?  
23 What kind of case is that?

24 MR. MILASINCIC: Well, Your Honor, we're, again,  
10:19 25 not alleging that these arbitrators have taken bribes or

1 that they were corrupt. They, as you know, are two very  
2 different legal standards, totally separate theories.

3 THE COURT: The key to this process and, I guess,  
4 my final question -- because the key is process -- is  
10:19 5 whether what I really need here is to understand the  
6 process; and, that is, I would need the transcript to see  
7 what the hearing consisted of, to see how thoroughly the  
8 arbitrators had -- how thorough the information was that the  
9 arbitrators had and how thoroughly they considered them with  
10:20 10 what kind of openness to arguments and with what kind of  
11 disciplined weighing of the various interests and arguments.

12 So, two questions, really.

13 One. Is the smartest thing for me to do --  
14 because this is, I think, the key of the case, the effect on  
10:20 15 the arbitral process given your allegations. Is the  
16 smartest thing for me to do to convert to summary judgment  
17 and give the parties sufficient time to supplement with the  
18 transcript? Which raises the question: If that occurs, is  
19 there any other discovery that would be appropriate, given  
10:21 20 the way in which I am conceiving of the critical issues on  
21 summary judgment? That is, I don't propose -- I don't see  
22 that you would need to discover the entire case in order to  
23 resolve on summary judgment or some version of an entire  
24 case -- to resolve on summary judgment the question of the  
10:21 25 impact of the arguments made and the positions taken by ALPA



1 on the integrity and fairness of the arbitral process.

2 That's the transcript.

3 MR. MILASINCIC: To take your first question first,  
4 Your Honor, the answer is --

10:22 5 THE COURT: How many days was the arbitration, by  
6 the way?

7 MR. MILASINCIC: I believe it was five days.

8 MR. ABRAM: Five or six days.

9 THE COURT: So, the transcript is not going to  
10:22 10 take up -- I mean, we're not talking about trees here.

11 MR. MILASINCIC: It's probably a binder.

12 THE COURT: We're not talking about a forest.  
13 Maybe trees, but not a forest.

14 MR. MILASINCIC: Right. It would be two to three  
10:22 15 binders. Right.

16 MR. ABRAM: It's all on one CD, Your Honor. Let's  
17 put it that way.

18 THE COURT: As administrative proceeding records  
19 go, this is short.

10:22 20 MR. ABRAM: Compared to the many we have all seen,  
21 yes, indeed.

22 THE COURT: All right.

23 MR. MILASINCIC: And, Your Honor, to answer the  
24 first question, we would say that, no, just looking at that  
10:22 25 transcript and converting it to summary judgment would

1 not be the --

2 THE COURT: Along with everything else that you  
3 guys have already presented.

4 MR. MILASINCIC: Along with the other allegations  
10:22 5 that we have already presented. But even to understand what  
6 the arbitrators did or did not consider, to take --

7 THE COURT: Wouldn't that --

8 MR. MILASINCIC: -- to assume --

9 (Simultaneous dialogue)

10:22 10 THE COURT: -- they're lengthy, thorough -- How  
11 many pages was that award?

12 MR. ABRAM: Was the...?

13 THE COURT: Award.

14 MR. ABRAM: Oh. Sorry, Your Honor. I think it was  
10:23 15 30 or 40 pages.

16 THE COURT: Again, as awards go in a five-day  
17 arbitration, that's pretty long.

18 MR. ABRAM: It goes to 57 pages including the  
19 Protocol Agreement.

10:23 20 THE COURT: Wipe that out.

21 MR. ABRAM: But the award itself is 46 pages.

22 THE COURT: So, let's just say a fulsome and  
23 thorough explanation of what they considered and how they  
24 got to their results combined with a record of the arguments  
10:23 25 and evidence they had, combined with the points that have

1 already been made in the briefing and the additional  
2 affidavits that the parties have presented, and I'd give you  
3 time to supplement a response to those affidavits. Maybe  
4 depose Mr. Hamilton is the only additional piece. But then  
10:23 5 say, You know what? The smartest way to do this is on  
6 summary judgment -- you guys have essentially argued it that  
7 way, frankly -- give you a chance to supplement in the way  
8 that I have described, and then I have something that I  
9 think is sufficient to decide the critical issue you have  
10:24 10 presented.

11 MR. MILASINCIC: And, Your Honor, we would ask,  
12 because it's not going to necessarily be the case that every  
13 influence that was exerted -- First of all, we don't know  
14 about all of them. We only know the ones that we have been  
10:24 15 able to allege without discovery. So, we're not going to be  
16 able to show --

17 THE COURT: The question is what the arbitral  
18 process consisted of.

19 MR. MILASINCIC: Well, we'll know with the record.

10:24 20 THE COURT: If the arbitral process record, which  
21 is the transcript, and the award itself are models of their  
22 genre, it's going to be tough to do anything.

23 MR. MILASINCIC: Your Honor, but that's assuming,  
24 contrary to our theory and our allegations, that all of the  
10:24 25 pressure by ALPA would have been exerted on the record or

1 would have been reflected by some --

2 THE COURT: But you have already said that you have  
3 no basis -- Rule 11 -- to even plead that the arbitrators  
4 themselves were tainted.

10:25 5 MR. MILASINCIC: That's correct.

6 THE COURT: So, I am struggling to figure out --  
7 Now, you're free to argue, obviously, when you file a  
8 supplemental brief based on the transcript and perhaps  
9 deposing Mr. Hamilton(?) -- is that the --

10:25 10 MR. ABRAM: Yes, Your Honor.

11 THE COURT: -- you are certainly free to argue, 'I  
12 need more and here's why and here's the 56, I think, (f)  
13 standard, 56(f) declaration or affidavit that says here's  
14 specifically what I need and why.' Sure. I mean you can  
10:25 15 make that argument, but you would be doing it in the context  
16 of 'Here's what we got and here's why it's not enough.'  
17 It's a specific argument as opposed to, 'Well, there might  
18 be other stuff out there that we don't know about right  
19 now,' but, frankly, you have made some pretty thorough and  
10:26 20 specific allegations, and we have an obvious source of  
21 information necessary to test the theory of liability that  
22 you have alleged.

23 We also have -- as I am conceiving this, that  
24 would, I suspect, give us enough to resolve the issue of  
10:26 25 estoppel. But if I decide and if -- I'm not ruling,

1 please -- I haven't seen the stuff -- but, if I were to  
2 decide this process is fine, in combination with the award,  
3 then I don't even have to get to the Defendants' estoppel  
4 argument at all and I think we are, at that point, resolved.

10:27 5 Now, if I do find that the arbitral process  
6 was, in fact, undermined, then, frankly, I don't think the  
7 estoppel argument matters.

8 MR. ABRAM: Well, I would want to get to that. It  
9 would depend upon the way in which it had allegedly been  
10:27 10 undermined.

11 THE COURT: Sure. Fair enough. Which means we  
12 can't get to it until we are there, if you will.

13 MR. ABRAM: That's a fair point, Your Honor.

14 THE COURT: So, what I would suggest we do -- and  
10:27 15 you guys can tell me if this makes sense or not -- what I  
16 would suggest that we do is convert at least the question of  
17 the breach of the duty of fair representation and the impact  
18 it had on the arbitral process to summary judgment, the  
19 motion to dismiss those claims to a motion for summary  
10:28 20 judgment and -- because I think the motion you filed was  
21 much more limited.

22 MR. ABRAM: More limited in what sense?

23 THE COURT: The alternative motion.

24 MR. ABRAM: Oh. Yes, it was. It was strictly with  
10:28 25 respect to -- Exactly, Your Honor.

1 THE COURT: Right. Thank you.

2 MR. ABRAM: It would take a conversion. Correct.

3 THE COURT: Right. So, I would convert in order to  
4 permit me to consider easily, without straining any legal  
10:28 5 limits, the entirety of the transcript, which I think is  
6 essential to -- and which the parties have essentially  
7 argued to deciding the issue, give you time to submit the  
8 transcript, give you time to depose Mr. Hamilton -- not a  
9 whole lot of time -- and give you some time to supplement  
10:29 10 your briefing. And then, if I need argument at that point,  
11 I am happy to give you argument, but, if not, I think I have  
12 a good basis on which to rule.

13 MR. MILASINCIC: And, Your Honor, just to clarify:  
14 Would the conversion be limited to solely this prong of the  
10:29 15 fiduciary duty claim as to whether it affected the  
16 arbitrators in any way? So, in other words, whether a  
17 breach, in fact, occurred --

18 THE COURT: No. I think I have got to find a  
19 breach, too, but I can find that, I think, in the  
10:29 20 information about what was presented --

21 MR. MILASINCIC: And could we also amend our  
22 pleadings, then, Your Honor, to focus more on this third  
23 issue of the causation?

24 THE COURT: In what way would you amend?

10:29 25 MR. MILASINCIC: To include more specific

1 information about the effect on the arbitrators' decision  
2 that's in there now.

3 THE COURT: I don't have a problem.

4 MR. ABRAM: If we were having to file the opening  
10:30 5 brief, it would help us to know in what respect --

6 THE COURT: Frankly, if I was to grant the  
7 dismissal motion, I would say, fine, you have got leave to  
8 amend. I'd have to do that, too.

9 MR. ABRAM: They have the whole transcript. They  
10:30 10 can tell us --

11 THE COURT: No problem.

12 MR. DULMAGE: Your Honor, I would like to add:  
13 Since ALPA is, in fact, saying that Continental MEC, which  
14 was the subdivision of ALPA that had to respond to the  
10:30 15 Continental pilots -- we almost have to show that they did  
16 nothing wrong. We may be able to find some evidence or  
17 introduce some evidence in additional pleadings where that,  
18 in fact, happened and we'd like an opportunity to do that if  
19 that's their argument. We didn't anticipate that until we  
10:30 20 got into this phase of briefing.

21 THE COURT: Well, that's the estoppel issue.

22 MR. DULMAGE: Well, it is, but it isn't, because I  
23 think -- See, Continental MEC is gone. It's now just United  
24 MEC.

10:30 25 THE COURT: It's called "merger". Right?

1 MR. DULMAGE: A lot of those same guys went there.  
2 So, you can sort of see the political pressure of the wink,  
3 wink, nod, nod stuff that may or may not have gone on.

4 We may have some evidence out there with other  
10:30 5 pilots that we can introduce into the record and at least  
6 plead some things, but we would only do that in good faith  
7 without the Court feeling like we were trying to maybe  
8 back-door the case based on --

9 MR. ABRAM: Your Honor, I have been around enough  
10:31 10 to know, when there is a motion to dismiss and the other  
11 side wants leave to amend, you're going to grant it.

12 THE COURT: I am going to grant it at least once,  
13 maybe twice --

14 MR. ABRAM: Maybe.

10:31 15 THE COURT: -- probably not three times.

16 MR. DULMAGE: Fair enough, Your Honor. Thank you.

17 MR. MILASINCIC: And, Your Honor, is there a  
18 protocol you would suggest? Because, as I am thinking about  
19 this, there are many types of limited discovery --

10:31 20 THE COURT: I am going to set some dates and I am  
21 going to set some limits on discovery. If you want to go  
22 beyond that, let's come back and talk about it. Because I  
23 really don't want to do --

24 (Simultaneous dialogue)

10:31 25 MR. MILASINCIC: -- limited discovery and they



1 disagree, then we can --

2 THE COURT: Sure. But try to work it out first.

3 In fact, what I would suggest is that before you file a  
4 motion for limited discovery you file -- not file -- you

10:31 5 send an e-mail or talk on the phone about possible discovery  
6 that would be consistent with perhaps an expansive view of  
7 what the Court has in mind, which is to essentially stage  
8 the case and limit the discovery at this stage to this  
9 threshold issue which I think is critical to going forward.

10:32 10 So, that's what we're doing. We're narrowing,  
11 staging and limiting discovery -- or "targeting" discovery,  
12 is the better word -- to what is necessary to resolve fully  
13 and accurately the threshold issue.

14 MR. ABRAM: Of the impact on the arbitration  
10:32 15 process?

16 THE COURT: Correct.

17 MR. ABRAM: Thank you.

18 THE COURT: Of what ALPA did. And that's why I  
19 don't really need to -- You can argue that what they did was  
10:32 20 or wasn't in breach of their duty -- that is, that it was  
21 not arbitrary or it was arbitrary, it was not in bad faith,  
22 it was in bad faith, it was indiscriminatory or it wasn't.  
23 And, there, I suspect, you have got stronger -- If by  
24 "discriminatory" you mean "not neutral" -- I think that's  
10:33 25 the crux of your argument, a combination of bad faith and

1 not neutral.

2 MR. MILASINCIC: Correct.

3 THE COURT: Right. So --

4 MR. MILASINCIC: And for purposes of this limited  
10:33 5 summary judgment, would our allegations of the bad faith  
6 acts be treated as true or would we need to also prove those  
7 up through this limited discovery?

8 THE COURT: So, what kind of allegations -- You  
9 know, the Hamilton deposition is directed, in part, towards  
10:33 10 that.

11 MR. MILASINCIC: And I'll have to check whether it  
12 would actually be Mr. Hamilton. I believe he was primarily  
13 offered on this administrative exhaustion issue. I'd have  
14 to review that.

10:33 15 MR. ABRAM: He was offered, I believe, on the  
16 witness --

17 THE COURT: Payments.

18 MR. ABRAM: -- payment.

19 THE COURT: Right. And that's the key. That's  
10:33 20 where I thought you were going here. Yeah.

21 So, I don't know what else you intend to add  
22 by way of amendment, but I think we are relatively clear  
23 that this is targeted towards the threshold issue.

24 On the question you asked, is it going to be  
10:34 25 assumed as true -- well, to the extent we're converting to

1 summary judgment, it's not assumed as true, but all  
2 inferences are going to be taken in your favor and all the  
3 usual presumptions that apply on a Rule 56 motion would  
4 apply.

10:34 5 MR. ABRAM: We would not be, Your Honor -- just to  
6 be clear in filing our next brief on the motion for summary  
7 judgment, we wouldn't be trying to put in a series of  
8 declarations about these various others acts.

9 THE COURT: No. That's right.

10:34 10 MR. ABRAM: And we would not do that without  
11 waiving the ability to do that at some point.

12 THE COURT: I agree. Here's where I think we are.

13 What ALPA did in the arbitration is not in  
14 factual dispute. Okay? It's going to be on the record.  
10:34 15 There may be some things that aren't. The payments. We're  
16 going to have the deposition relevant to that. The merger  
17 agreement that was the backdrop, the Merger Policy that  
18 forms the backdrop. But most of what ALPA did -- the  
19 positions it took, the briefs it filed, the arguments it  
10:35 20 made, the evidence it presented -- in the arbitration are  
21 going to be on the record of that arbitration.

22 MR. MILASINCIC: Except for and one thing we would  
23 ask for in this limited discovery is any communications, and  
24 maybe the answer is none to this RFP that ALPA or its  
10:35 25 employees and officers had with these arbitrators about this

1 seniority list off the record. And perhaps their answer to  
2 that, in requests for production, will be 'We did a good  
3 faith search and there aren't any,' but we would at least  
4 like to --

10:35 5 THE COURT: Why don't you find that out.

6 MR. ABRAM: We'll be glad to find that out, Your  
7 Honor, although it's contradicted by their recognition that  
8 these arbitrators were not corrupted. But, nonetheless, we  
9 understand and you're asking us to do that and we will.

10:36 10 THE COURT: I think that's appropriate to do.

11 MR. ABRAM: Thank you, Your Honor.

12 THE COURT: I think you can do it without the need  
13 for a formal discovery request. There's one been made on  
14 the record here in court.

10:36 15 MR. ABRAM: Thank you, Your Honor.

16 MR. DULMAGE: I'm not so sure we're conceding just  
17 yet that there wasn't some corruption in the process. We  
18 just don't have any evidence --

19 THE COURT: I heard you say that earlier, but --  
10:36 20 That's fine. That's fine. You don't have any Rule 11 basis  
21 to go forward with making any allegation about it.

22 MR. DULMAGE: And if I could take 20 seconds and  
23 give the Court an example. I had in Judge Ewing's court  
24 against the local --

10:36 25 THE COURT: You mean Judge Werlein?

1 MR. DULMAGE: Yeah. Werlein.

2 THE COURT: Thank you.

3 MR. DULMAGE: Excuse me.

4 THE COURT: Just don't call me "Judge Lee".

10:36 5 MR. DULMAGE: Yeah.

6 Years ago we had an arbitrator that had an  
7 opinion giving this guy his job back, and then ALPA, working  
8 with the company, wanted to get the guy out. So, they  
9 submitted a second award, and we got both of those in  
10:36 10 discovery. And I threatened to sue the arbitrator, and the  
11 arbitrator immediately went back to his original award,  
12 which was to give the guy his job back. This stuff  
13 sometimes doesn't come up until we get in discovery.

14 THE COURT: You know, now we're back in the "Weird  
10:37 15 things could happen" realm --

16 MR. DULMAGE: Right.

17 THE COURT: -- but Rule 11 is a little bit short of  
18 that.

19 You don't have any basis that would satisfy  
10:37 20 Rule 11 to allege that these guys had been personally  
21 corrupted.

22 MR. MILASINCIC: Right. And one thing we'll  
23 address in our supplemental briefs, Your Honor, is it's not  
24 necessary for us to prove anything close to that in order to  
10:37 25 prevail on the claim as we've pleaded.

1 THE COURT: And that's why the focus ought to be on  
2 let's look at what ALPA did that is on the record that the  
3 arbitrators had and what the arbitrators -- and what the  
4 process that the arbitrators used was. And that's the  
10:37 5 focus. Okay?

6 MR. MILASINCIC: Thank you, Your Honor.

7 THE COURT: So, let's set, briefly -- I think our  
8 last point here is time to do all of this.

9 MR. ABRAM: Yes, Your Honor.

10:37 10 THE COURT: So, the first step is get the  
11 transcript. Has it already been transcribed?

12 MR. ABRAM: Yes, it has.

13 THE COURT: So, that's like a matter of days.

14 MR. ABRAM: They already have it.

10:38 15 THE COURT: So, file it.

16 MR. ABRAM: You would like that filed per se as --

17 THE COURT: It can be filed -- It would be similar,  
18 if you will, in the way we handle cases that come in on  
19 various kinds of administrative records. So, you're going  
10:38 20 to file the administrative record, if you will.

21 MR. ABRAM: We will do that, Your Honor.

22 THE COURT: Just to make things efficient for me,  
23 file it with the decision, with the award.

24 MR. ABRAM: And the exhibits. And, Your Honor,  
10:38 25 it's a full record, and some of this is confidential and, if

1 it is, we will file separately anything that was  
2 confidential, because, you know, some is company  
3 confidential information that we can't disclose.

4 THE COURT: Okay. Yeah. Well, you can if I order  
10:38 5 you to, but we're going to have to get there.

6 MR. ABRAM: Well, we will do it as part of a  
7 separate filing, but it's confidential.

8 THE COURT: That's fine.

9 So, what I would appreciate -- because I  
10:38 10 expect it's going to be somewhat voluminous, not huge,  
11 but -- So, file it electronically, but also send a courtesy  
12 copy -- two courtesy copies -- one for the law clerk -- to  
13 chambers.

14 MR. ABRAM: And that would be printed form?

10:39 15 THE COURT: The old-fashioned way.

16 MR. ABRAM: You got it, Your Honor.

17 THE COURT: You can double-side it.

18 MR. ABRAM: We'll save a few trees.

19 THE COURT: There you go.

10:39 20 So, do that, if you will. I know it's summer.  
21 Can you do both of those things by -- is August 15th too  
22 short? That's two weeks from tomorrow.

23 MR. SOUTHERLAND: No.

24 THE COURT: Somebody going on vacation?

10:39 25 MR. SOUTHERLAND: I think we can get it filed.

1 MR. ABRAM: I am, but it doesn't matter. It will  
2 be just shortly before then.

3 MR. SOUTHERLAND: We'll get it done by then.

4 THE COURT: All right. So, file that by August 15.

10:40 5 Now, what's a reasonable amount of time, since  
6 you both have access to it now and you're not waiting for it  
7 to be filed to have access to it, either side -- what's a  
8 reasonable amount of time for a supplemental -- well, to  
9 complete additional discovery (limited) -- limited,  
10:40 10 limited -- on the points that will be considered in this  
11 threshold summary judgment?

12 MR. MILASINCIC: I would suggest three months, Your  
13 Honor.

14 THE COURT: Oh, no. No. No. No.

10:40 15 MR. MILASINCIC: And if I may. The only reason for  
16 that is because many of these witnesses, being airline  
17 pilots and the Union being in DC --

18 THE COURT: But there are not that many witnesses.

19 MR. MILASINCIC: There will be one or two and the  
10:40 20 document requests. Perhaps two months.

21 THE COURT: 60 days I am comfy with. I'm not  
22 comfortable with 90 days or beyond.

23 So, 60 days, which will take us to, let's say,  
24 September 26 any additional discovery will be completed.

10:41 25 Supplemental brief. Of course, you will be



1 briefing busily before then because you will be dealing with  
2 the transcript, which you already have. So, I am thinking  
3 that we could do the supplemental brief pretty quickly after  
4 the last discovery is completed, which does not have to wait  
10:41 5 until the very end of September. Could you get that done by  
6 October 13th?

7 MR. ABRAM: Yes, Your Honor.

8 THE COURT: Is that reasonable?

9 MR. ABRAM: This would be ALPA's -- ALPA is doing  
10:41 10 the next brief?

11 THE COURT: Yes. I think so.

12 MR. ABRAM: Yes, Your Honor.

13 THE COURT: I think so. And what I would do,  
14 again, just to have it all in one place, is just file it as  
10:41 15 if it was your brief, not incorporating by reference  
16 everything that went before and 'We're now going to add a  
17 few things.' Just file a brief on this issue, on this  
18 motion. And if it repeats some of what you said earlier,  
19 great; it's all in one document.

10:42 20 MR. ABRAM: Makes sense. Thank you, Your Honor.

21 THE COURT: And you will have then the usual period  
22 after that, which would be November 3rd. I am going to give  
23 you until November 10th to file a brief reply.

24 And I don't think we're going to need argument  
10:42 25 because I think we have had a lot of it, but I am happy to

1 schedule it, which would be -- Let's schedule it for  
2 November 17, just shortly after the reply. Okay?

3 MR. MILASINCIC: And, Your Honor, may we have until  
4 the discovery deadline to amend the pleadings or is there a  
10:42 5 different date you would have in mind?

6 THE COURT: Let's do it a little bit earlier than  
7 that -- let's say two weeks before -- so that, if there is  
8 any additional discovery that needs to be done based on what  
9 you asserted -- Well, we ought to do it 30 days before.  
10:43 10 Yeah, I think we ought to do it 30 days before. So, amend  
11 your pleadings by August 29.

12 MR. MILASINCIC: Yes, Your Honor.

13 THE COURT: So, having said all of this, I am going  
14 to deny the motion to dismiss as moot because a) you're  
10:43 15 going to amend and b) I am converting.

16 I am going to deny, at this point on the  
17 present record, the motion to require the joinder of United.  
18 Clearly, for this threshold stage, it is not necessary. And  
19 I am quite worried about the propriety of doing that, given  
10:44 20 the absence of case support, that I could find that the  
21 employer is an appropriate, compelled added party in a "duty  
22 of fair representation/breach" case between the Union and  
23 members of the Union; and that's really what we're talking  
24 about, in the absence of any indication by United that it  
10:44 25 wants to come to this party.

1 MR. ABRAM: Subject to later possible revisit.

2 THE COURT: I have denied it based on the present  
3 record. That's all I have done.

4 MR. ABRAM: Your Honor, regarding November 17 --

10:44 5 THE COURT: Yes, sir.

6 MR. ABRAM: -- I am hoping that this does not  
7 occur, but I am currently scheduled for a trial in Denver.

8 THE COURT: If you are, indeed, in trial and you  
9 know within a reasonable period before then, let us know and  
10:45 10 we'll move it, but let's go ahead and keep it on that date  
11 for now, because we all know that a lot can happen to a  
12 trial that is set in November.

13 MR. ABRAM: Yeah. Thank you, Your Honor.

14 THE COURT: We're on the calendar, at least. And I  
10:45 15 may decide I don't even need to see you based on what I read  
16 and have available here for me.

17 Is anybody going to get this transcript?

18 MR. ABRAM: Yes, Your Honor.

19 THE COURT: Okay. Would you make sure you file a  
10:45 20 copy as well, then, just so we have it on the record. All  
21 right?

22 MR. ABRAM: We will do that.

23 THE COURT: Good. Anything further for today? Are  
24 there any other outstanding motions that I can helpfully  
10:45 25 address today?

1 MR. MILASINCIC: There are not, Your Honor.

2 MR. ABRAM: No, Your Honor.

3 THE COURT: Thank you very much.

4 MR. ABRAM: Thank you, Your Honor.

10:45 5 MR. MILASINCIC: Thank you, Your Honor.

6

7 COURT REPORTER'S CERTIFICATE

8 I, BRUCE SLAVIN, certify that the foregoing is a  
9 correct transcript from the record of proceedings in the  
10 above-entitled matter, to the best of my ability.

11

12 s/Bruce Slavin  
13 BRUCE SLAVIN, RPR, CMR

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